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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

THE BOARD OF TRUSTEES, in their) No. C 07-04784 EMC
capacities as Trustees of the LABORERS)
HEALTH AND WELFARE TRUST FUND)
FOR NORTHERN CALIFORNIA;)
LABORERS VACATION-HOLIDAY TRUST) PLAINTIFFS' MOTION FOR
FUND FOR NORTHERN CALIFORNIA;) DEFAULT JUDGMENT
LABORERS PENSION TRUST FUND FOR)
NORTHERN CALIFORNIA; and LABORERS)
TRAINING AND RETRAINING TRUST) Date: August 20, 2008
FUND FOR NORTHERN CALIFORNIA,) Time: 10:30 a.m.
) Judge: Honorable Edward M. Chen
) Courtroom: C, 15th Floor
Plaintiffs,)
)
v.)
)
CHESTER L. NEAL, Individually and doing)
business as C.L. NEAL CONSTRUCTION,)
)
)
Defendant.)

Plaintiffs, THE BOARD OF TRUSTEES, in their capacities as Trustees of the
 LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA;
 LABORERS VACATION-HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA;
 LABORERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA; and LABORERS
 TRAINING AND RETRAINING TRUST FUND FOR NORTHERN CALIFORNIA (hereinafter

1 “Plaintiffs”) submit the following Motion For Default Judgment against Defendant CHESTER L.
2 NEAL, Individually and doing business as C.L. NEAL CONSTRUCTION, (hereinafter
3 “Defendant”).

4 **I. NOTICE OF MOTION AND MOTION**

5 TO THE DEFENDANT:

6 PLEASE TAKE NOTICE that on August 20, 2008 at 10:30 a.m. in the courtroom of the
7 Honorable Magistrate Judge Edward M. Chen of the United States District Court for the Northern
8 District of California, located at 450 Golden Gate Avenue, Courtroom C, 15th Floor, San
9 Francisco, California, the Plaintiffs by and through their undersigned counsel, will move, and
10 hereby do move, the Court to order that a default judgment in their favor and against Defendant be
11 entered in this action, to compel Defendant to forthwith submit to an audit of his books, records,
12 papers and reports as required by the Agreements to which he is bound. The motion will be
13 brought pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure (F.R.C.P.), and will be
14 based on the following grounds. The Clerk entered default against the Defendant on February 21,
15 2008, who were timely served with the complaint, whose service was deemed complete on January
16 19, 2008, but failed to answer the complaint. Plaintiff Trust Funds are therefore entitled to entry of
17 default judgment against the Defendant under F.R.C.P. 55(b)(2) by the Court. This Notice and
18 Motion are supported by the Memorandum Points and Authorities contained herein, and the
19 Declaration of John Hagan and exhibits thereto, Declaration of Kristina Zinnen, and a proposed
20 form of judgment, all of which are filed concurrently herewith.

21 **II. RELIEF REQUESTED**

22 Plaintiffs respectfully request that the Court enter a default judgment in favor of the
23 Plaintiffs against Defendant in which it is ordered that:

24 1. Defendant shall submit to a full audit by auditors the Plaintiffs will select, at the
25 premises of Defendant, or the premises where its records are kept, during business hours, at a
26 reasonable time or times, and to allow the auditors to examine and copy such books, records,
27 papers, and reports of Defendant relevant to the enforcement of the Collective Bargaining

1 Agreement or Trust Agreement, including but not limited to the following:

2 Individual earning records (compensation); W-2 forms; 1096 and 1099
3 forms; reporting forms for all Trust Funds; State DE-3 tax reports; workers
4 compensation insurance report; employee time cards; payroll journal;
5 quarterly payroll tax returns (form 941); check register and supporting
6 cash voucher; Form 1120 - 1040 or partnership tax returns; general ledger
7 - (portion relating to payroll audit);

8 2. Defendant shall forthwith cease its refusal to submit to an audit of its books, records,
9 papers, and reports as the agreements to which they are bound require;

10 3. Upon completion of the audit, Defendant shall pay over to Plaintiffs such sums as shall
11 be ascertained to be due from Defendant and interest on those sums;

12 4. Defendant shall pay actual damages according to proof;

13 5. Defendant is permanently enjoined, for so long as it remains obligated to contribute to
14 Plaintiffs Trust Funds, from failing, neglecting, or refusing to timely submit required monthly
15 contributions reports and payments as the terms of the collective bargaining agreement, Trust
16 Agreement, and the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA")
17 sections 502(a)(3), (g)(2), 29 U.S.C. § 1132(a)(3), (g)(2) require;

18 6. Defendant shall pay attorneys' fees and costs in the amount of \$5,713.85;

19 7. Such further relief as the Court deems just and proper; and

20 8. This Court retains jurisdiction of this matter to enforce the Order compelling an audit
21 and payment of all amounts found due and owing.

22 **III. MEMORANDUM OF POINTS AND AUTHORITIES**

23 The motion will be brought pursuant to Rule 55(b)(2) of the Federal Rules of Civil
24 Procedure, and will be based on the following grounds set forth herein. Plaintiffs cannot determine
25 whether Defendant has made prompt and correct payment of all fringe benefit contributions, and as
26 a consequence, Plaintiffs have, with good cause, demanded that Defendant submit to an audit
27 pursuant to the respective collective bargaining agreements and Trust Agreements.

28 Defendant has failed, refused or neglected to allow the audit as requested or inspection of
their books, records, papers, or reports in accordance with the provisions of the Trust Agreements.

1 As a result of Defendant's refusal to submit to the audit, Plaintiffs are unable to ascertain the
 2 amount of damages, if any, the Defendant has caused the Trust Funds. Plaintiffs have no adequate
 3 remedy at law. Furthermore, the individual Laborers who are the beneficiaries of the respective
 4 Trust Funds, particularly the Defendant's employees, are damaged thereby and also have no
 5 adequate remedy at law.

6 Plaintiffs are intended third party beneficiaries of the collective bargaining agreement, but
 7 Trust Fund contribution delinquencies are excluded from the arbitration provision of the
 8 agreement. Plaintiffs have complied with all conditions on their part to be performed under the
 9 terms of the applicable agreements.

10 The Plaintiffs filed suit for issuance of an injunction to conduct the audit and to obtain an
 11 award of the damages owed for delinquent contributions, liquidated damages, and interest for any
 12 contributions found due and owing, and attorneys' fees and costs on September 17, 2007.

13 The Defendant did not respond to the complaint; therefore, at the request of the Plaintiffs,
 14 default was entered against Defendant on February 21, 2008. Plaintiffs are entitled to a judgment
 15 that includes an injunction regarding the audit, and an order to pay all contributions found due and
 16 owing from the audit, plus liquidated damages and interest, and attorneys fees and costs.

17 **A. STATEMENT OF THE ISSUES**

18 The Court must decide the following issues:

- 19 1. Must the Court order Defendant to produce the documents necessary for the
 20 Plaintiff Trust Funds to complete their audit, since the Trust Agreements require it to submit to the
 21 audit?
- 22 2. Has Defendant breached his fiduciary duty to Plaintiffs?
- 23 3. If contributions are found due and owing from the audit, are Plaintiff Trust Funds
 24 entitled to interest and liquidated damages on those delinquent contributions?
- 25 4. Are Plaintiffs entitled to attorneys' fees and costs related to this matter in the
 26 amount of \$5,713.85 pursuant to the terms of the Agreements and ERISA?

B. STATEMENT OF RELEVANT FACTS

At all times material herein, Plaintiffs were Trustees of the Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California (hereinafter “Trust Funds”). At all times material herein, each of the above-named Trust Funds was, and now is, an employee benefit plan created by a written Trust Agreement subject to and pursuant to section 302 of the Labor Management Relations Act (hereinafter “LMRA”), 29 U.S.C. § 186, and a multiemployer employee benefit plan within the meaning of sections 3, 4, and 502 of the Employee Retirement Income Security Act of 1974 (hereinafter “ERISA”), 29 U.S.C. §§ 1002, 1003, and 1132. The Board of Trustees administers each of the above-named Plaintiff Trust Funds, and may bring this action in the name of the Trust Funds pursuant to the express provisions of the Trust Agreements. Hagan Decl. ¶ 3.

At all times material herein, Defendant has been an employer within the meaning of Section 3(5) and Section 515 of ERISA, 29 U.S.C. §§ 1002(5), 1145, and an employer in an industry affecting commerce within the meaning of Section 301 of the LMRA, 29 U.S.C. § 185. At all relevant times, Defendant was signatory and bound to a written collective bargaining agreement with the Northern California District Council of Laborers (hereinafter “Union”), a labor organization within the meaning of section 301 of the LMRA, 29 U.S.C. § 185. Defendant became subject to all the terms and conditions of the Laborers Master Agreement (hereinafter “Master Agreement”) by virtue of signing a Memorandum of Agreement (hereinafter “Memorandum Agreement”) with the Union, which incorporated by reference the Master Agreement. Hagan Decl. ¶ 4; Master Agreement, Ex. A and Ex. B to Hagan Decl.; Memorandum Agreement, Ex. C to Hagan Decl.

By its terms, the Master Agreement binds Defendant to the Trust Agreements establishing each of the Plaintiff Trust Funds. Hagan Decl. ¶ 6; Trust Agreements, Ex. D to Hagan Decl. By signing the Master Agreement and Memorandum Agreement, Defendant agreed to the terms and conditions of these agreements. Defendant specifically promised to contribute and pay to the Trust

1 Funds the hourly amounts required by the collective bargaining agreements for each hour paid for
 2 and/or worked by any of its employees who performed any work covered by said agreements, and
 3 that it would be subject to and bound by all of the terms, provisions and conditions of the Trust
 4 Agreements. Hagan Decl. ¶ 7; Master Agreement, Ex. A and Ex. B to Hagan Decl. at §§ 1B, 28A.

5 The Board of Trustees has, as one of its purposes, the obligation to ensure that
 6 contributions required to be made to the Trust Funds pursuant to the Master Agreement are fully
 7 and correctly made. The purposes of the respective Trust Funds are to provide health and welfare,
 8 vacation, pension and other benefits for Laborers on whose behalf contributions are made, and
 9 whose benefits are supported by such contributions, and to ensure that employers who are
 10 signatories to the Master Agreement comply with the terms of those agreements with respect to
 11 payments of contributions to the Trust Funds. Hagan Decl. ¶ 8.

12 The Trust Funds rely on employers' self-reporting and conduct audits to ensure the
 13 employers' compliance with their contributing obligations. Performing audits is one way the Trust
 14 Funds may determine if the employer is making full and prompt payment of required contributions
 15 pursuant to the Master Agreement and Trust Agreements. Hagan Decl. ¶ 9.

16 Section 7 of the Master Agreement provides that "Each Individual Employer, upon request
 17 of any Trust Fund specified in this Agreement, shall permit a Trust Fund Auditor to review any and
 18 all records relevant to the enforcement of the provisions of this Agreement pertaining to the Trust
 19 Funds." Hagan Decl. ¶ 10; Master Agreement, Ex. A and Ex. B to Hagan Decl. at § 7.

20 Section 28A of the Master Agreement provides

21 Any Individual Employer who is found to be delinquent as a result of an
 22 audit will pay and satisfy such delinquency with accrued interest and in
 23 addition pay liquidated damages. All delinquent contributions shall bear
 24 simple interest at the rate of one and one-half percent (1.5%) per month until
 25 receipt of payment. Subject to accounting verification, liquidated damages
 shall be assessed on delinquent contributions at a flat rate of one hundred
 and fifty dollars (\$150.00) per month to reflect the internal administrative
 costs incurred by the trust administrators in monitoring and tracking such
 late contributions.

26 Hagan Decl. ¶ 11; Master Agreement, Ex. A and Ex. B to Hagan Decl. at § 28A.

27 Article IV, section 9, of the Trust Agreement creating the Welfare Fund, Article VI, section

8, of the Trust Agreement creating the Vacation-Holiday Fund, Article IV, section 8, of the Trust Agreement creating the Pension Fund, and Article IV, section 8 of the Trust Agreement creating the Training Fund, each provide that:

Upon request in writing from the Board of Trustees, an Individual Employer will permit a Trust Fund Auditor to enter upon the premises of such Individual Employer during business hours, at a reasonable time or times, not less than two (2) working days after such request, and to examine and copy such books, records, papers, or reports of such Individual Employer as may be necessary to determine whether the Individual Employer is making full and prompt payment of all sums required to be paid by him to the Fund.

Hagan Decl. ¶ 12; Trust Agreements, Ex. D to Hagan Decl.

In accordance with the above provisions of the Master Agreement and the Trust Agreements, the Trust Funds demanded an audit of Defendant's records to determine if Defendant made proper reporting to the Trust Funds. Since Defendant refused to comply with the Trust Funds' audit demands, Plaintiffs filed suit on September 17, 2007 to obtain an injunction for an audit and to collect any contributions found due and owing from the audit, plus interest and liquidated damages, and attorneys' fees and costs. Hagan Decl. ¶ 13.

Plaintiff Trust Funds served Defendant with the Summons and Complaint by substituted service under California Code of Civil Procedure section 415.20(b) on December 26, 2007, and mailed the Summons and Complaint to Defendant on January 9, 2008, for which service was deemed complete under CCP 415.20(b) on January 19, 2008. Plaintiff Trust Funds filed the Proof of Service Summons with the Court on January 16, 2008. Defendant failed to answer or otherwise respond to the Complaint. Consequently, at the request of the Plaintiffs, the Clerk entered default against Defendant on February 21, 2008. Zinnen Decl. ¶ 3.

The above-mentioned Agreements provide for the payment of reasonable attorneys' fees and costs in connection with this matter due to Defendant's failure to allow the audit pursuant to those Agreements. Hagan Decl. ¶ 14; Trust Agreements, Ex. D to Hagan Decl. at Health and Welfare Trust Fund Art. IV, § 3; Pension Trust Fund Art. IV, § 3; Vacation-Holiday Trust Fund Art. III, § 6; and Training and Retraining Trust Fund Art. IV, § 3. In light of Defendants' failure to submit to an audit, the Trust Funds have incurred attorney's fees in the amount of \$5,156.25 and

costs in the amount of \$557.60, for a total of \$5,713.85. Hagan Decl. ¶ 15; Zinnen Decl. ¶¶ 8, 10.

C. ARGUMENT

The Court entered default against the Defendant on February 21, 2008 for failure to answer or otherwise respond to the complaint on file in this action. For the reasons set forth below, Plaintiffs are entitled to the relief sought herein.

1. The Trust Funds Have A Right To Compel The Audit At Issue.

Where a trust agreement, as here, gives Trustees of an employee benefit plan the right to audit an employer's books and records, it will be enforced. Central States Southeast and Southwest Areas Pension Fund v. Central Transport Inc., 472 US 559 (1985) Reh'g denied 473 U.S. 926 (1985); Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp. 920 F.2d 1491 (9th Cir. 1990), cert. denied, 501 U.S. 1232 (1991).

The Trust Agreements governing the Trust Funds provide for an audit of the books and records of signatory employers so that the Funds may determine if the employer is making full and prompt payment of required contributions. Article IV, section 9, of the Trust Agreement creating the Welfare Fund, Article VI, section 8, of the Trust Agreement creating the Vacation-Holiday Fund, Article IV, section 8, of the Trust Agreement creating the Pension Fund, and Article IV, section 8 of the Trust Agreement creating the Training Fund, each provide that:

Upon request in writing from the Board of Trustees, an Individual Employer will permit a Trust Fund Auditor to enter upon the premises of such Individual Employer during business hours, at a reasonable time or times, not less than two (2) working days after such request, and to examine and copy such books, records, papers, or reports of such Individual Employer as may be necessary to determine whether the Individual Employer is making full and prompt payment of all sums required to be paid by him to the Fund.

Hagan Decl. ¶ 12; Trust Agreements, Ex. D to Hagan Decl.

Unless this Court enjoins Defendant, the Defendant will continue to fail, neglect, or refuse to submit to an audit of books and records by the Trust Funds and thereby cause Plaintiffs irreparable harm for which there exists no adequate remedy at law.

1 **2. Defendant Has Breached His Fiduciary Duty to Plaintiffs By Refusing to Allow**
 2 **a Full Audit.**

3 Pursuant to the written agreements establishing the Laborers Trust Funds, Defendant has
 4 failed, neglected, or refused to allow Plaintiffs access to the records requested and needed to
 5 determine the exact amount of fringe benefit contributions owed to the Trust Funds. Hagan Decl. ¶
 6 13. Defendant's neglect or refusal pursuant to the terms of the above-mentioned agreements
 7 constitutes a violation of ERISA section 515, 29 U.S.C. § 1145. Section 515 provides that:

8 Every employer who is obligated to make contributions to a multi-employer
 9 plan under the terms of the plan or under the terms of a collectively
 10 bargained agreement shall, to the extent not inconsistent with the law, make
 11 such contributions in accordance with the terms and conditions of such plan
 12 or such agreement.

13 Defendant, in agreeing to the terms and conditions of the aforementioned Trust
 14 Agreements, assumed a fiduciary duty to Plaintiffs, which required Defendant to submit timely and
 15 accurate reports of hours worked or amounts due, together with payments to the Trust Funds.
 16 Defendant exercised control over any contributions due, which are assets of the Trust Funds, and
 17 Defendant was a fiduciary as defined by ERISA section 3(21), 29 U.S.C. § 1002(21).

18 Thus, the actions of Defendant complained of herein constitute a violation of fiduciary
 19 duties as defined by ERISA, 29 U.S.C. §§ 1001, et seq. Unless this Court enjoins Defendant, the
 20 Defendant will continue to fail, neglect, or refuse to remit appropriate fringe benefit contributions
 21 to the Trust Funds and thereby cause Plaintiffs irreparable harm for which there exists no adequate
 22 remedy at law.

23 **3. If the Audit Reveals That Contributions Are Due and Owing, Defendant Will**
 24 **Be Liable for Liquidated Damages and Interest Under ERISA § 515 and the**
 25 **Trust Agreements.**

26 Plaintiffs are entitled any unpaid contributions found due and owing from the audit.
 27 Additionally, Plaintiffs are entitled to interest, liquidated damages, expenses incurred in connection
 28 with delinquencies, reasonable attorney's fees and costs of the action pursuant to the Trust
 Agreements and ERISA. Section 502(g)(2) of ERISA, 29 U.S.C. Section 1132(g)(2) provides:

In any action under this title by a fiduciary for or on behalf of a plan to enforce §515 in which a judgment in favor of the plan is awarded, *the court shall award the plan* –

- (A) the unpaid contributions,
- (B) interest on the unpaid contributions,
- (C) an amount equal to the greater of
 - (i) interest on the unpaid contributions, or
 - (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent [...]
- (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
- (E) such other legal or equitable relief as the court deems appropriate.

(emphasis added).

Furthermore, where a trust agreement, as here, requires contributions on behalf of employees who performed covered work, it will be enforced. See Agthos v. Starlite Motel, 977 F.2d 1500 (3rd Cir. 1992); Benson v. Bowers Moving & Storage, Inc. 907 F.2d 310 (2nd Cir. 1990). Determinations of the amounts due under the collective bargaining agreement requiring payments to third party beneficiary Trust Fund will be construed in favor of the funds. See Irwin v. Carpenters Health and Welfare Trust Fund for California, 745 F.2d 553, 555-557 (9th Cir. 1984); Brick Masons Pension Trust v. Industrial Fence & Supply, Inc., 839 F.2d 1333 (9th Cir. 1988). With respect to liquidated damages owed under collective bargaining agreements, under federal common law, liquidated damages provisions, such as the one at hand, are enforceable and not void as a penalty. Idaho Plumbers v. United Mechanical Contractors, 875 F.2d 212, 216 (9th Cir. 1989); United States v. Carter, 353 U.S. 210 (1957).

Pursuant to the written agreements establishing the Laborers Trust Funds, Defendant agreed to pay contributions to the Trust Funds for every hour of covered work performed by their employees, as well as liquidated damages, interest, attorneys' fees, and related costs in the event such contributions were not timely paid. Hagan Decl. ¶¶ 7, 11, 14; Master Agreement, Ex. A and Ex. B to Hagan Decl. at § 28A; Trust Agreements, Ex. D to Hagan Decl. at Health and Welfare

Trust Fund Art. IV, § 3; Pension Trust Fund Art. IV, § 3; Vacation-Holiday Trust Fund Art. III, § 6; and Training and Retraining Trust Fund Art. IV, § 3.

4. Plaintiffs Are Entitled to Their Attorneys' Fees and Costs.

The Trust Funds are entitled to a mandatory award of attorneys' fees under Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2). Furthermore, because courts generally award attorneys' fees based on such contractual authorization, Defendant should be liable for the reasonable cost of attorneys' fees and costs the Trust Funds incurred in seeking to enforce its right to an audit. See, Kemner v. District Council of Painting and Allied Trades No. 36, 768 F.2d 1115, 1120 (9th Cir. 1985). The Trust Agreements also provide for reasonable attorneys' fees, court costs, and all other expenses incurred in enforcing the Agreements. Hagan Decl. ¶ 14; Trust Agreements, Ex. D to Hagan Decl. at Health and Welfare Trust Fund Art. IV, § 3; Pension Trust Fund Art. IV, § 3; Vacation-Holiday Trust Fund Art. III, § 6; and Training and Retraining Trust Fund Art. IV, § 3.

The total amount of attorneys' fees and costs billed to date is \$5,713.85 The amount of attorneys' fee will increase for time spent on any additional filings related to this Motion, including counsel's appearance at the hearing. Zinnen Decl. ¶¶ 8, 10.

D. CONCLUSION

For the above-stated reasons, the Court must enter judgment in favor of the Trust Fund.

Dated: June 26, 2008

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/
KRISTINA M. ZINNEN
Attorneys for Plaintiffs

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